IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77-433

CHARLES BEN HOWELL, Suing on behalf of himself and all other persons similarly situated, as a class ..... *Petitioners*

VS.

DALLAS BAR ASSOCIATION, Et al ..... *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION OF DALLAS BAR ASSOCIATION

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For reply to "Brief of Respondent Dallas Bar Association in Opposition" to the petition for certiorari, petitioners submit the following:[1]

QUESTION ONE:

RESPONDENT HAS MISREAD THE RULING OF THE FIFTH CIRCUIT.

Respondent has cited *E. W. Bliss v. U. S.*, 351 F.2d 449 (6-Oh. 1965), as its principal authority. Paraphrasing that

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[1]Unless otherwise indicated, all emphasis has been supplied by petitioners.

case, respondent apparently contends that the Fifth Circuit ruled as follows:

> " 'The district court has rendered a comprehensive opinion with which we find ourselves in full agreement.' Therefore, the case is affirmed without further opinion."

First Point

For reasons stated on pages 11-17 of the petition, petitioners believe that any such ruling by the Fifth Circuit would be untenable. Without unduly lengthening this reply, we point to the first issue presented in the Fifth Circuit urging that the District Court erred in dismissing without notice, without hearing, denying leave to amend or to dismiss without prejudice (Ptn. 9, 11-12). Respondent concedes the statement of the case to be "substantially correct" (DBA Br. 2), but simultaneously argues that the Fifth Circuit expressly approved of this drumhead disposition of the complaint. Petitioners do not believe that a summary affirmance order can be so read; certainly not in this case with such diverse parties and issues.

Second Point

We are in full accord with *Bliss*. It simply does not apply. If a Court of Appeals desires to adopt the district court opinion, it certainly is free to do so. Such is oftentimes a salutary and expeditious method of deciding an appeal. Presently, the rub is that the Fifth Circuit did not do so.

Obviously, respondent is guessing as to the reasoning of the Fifth Circuit; just as petitioners and the Supreme Court have been left to guess. To adopt the opinion of a district court requires only a short paragraph from a Court of Appeals. The Fifth Circuit has not even provided this

minimal indication of the basis for its ruling and for such reason, the writ should be granted.

QUESTION TWO:

THERE ARE NO "INDEPENDENT BASES" TO SUSTAIN THE JUDGMENT BELOW.

Respondent has subdivided our Question Two into three questions which it has numbered 2, 3 and 4. It has argued on virtually every page of its brief that "there were several independent bases" for the judgment below (*e.g.* DBA Br. 1). However, we can only distill three claims of "independent basis" from respondent's brief: (1) The claim that the Constitution does not protect the right to seek or hold state office; (2) The claim that no cause of action has been stated against DBA (emphasis: *against DBA*) under 42 *U.S.C.* §1983 or §1985; and (3) The claim that the complaint lacks the "specificity" supposedly required in a civil rights case. We reply in inverse order:

Third Claim

(a) Question Two as stated by these petitioners is certainly broad enough to cover respondent's contentions regarding "specificity". The statement of a question presented includes "every subsidiary question fairly comprised therein," *S.Ct. R.* 23(1)(c).

(b) We do not agree that a civil rights complaint requires any special "specificity". Several cases have indicated that civil rights complaints should be construed with special liberality.

(c) The rule laid in *Conley v. Gibson*, 355 U.S. 41 (1957), has already been discussed (Ptn. 11-12).

(d) The fact that the District Court dismissed without notice, without hearing, without leave to amend, and denied a request to dismiss without prejudice has already been discussed.

(e) Nor do we concede the complaint to be fatally vague; certainly not under the circumstances reflected by this record. DBA is accused of tampering with the electoral process for the purpose of electing only those judges possessing an affinity for the views of the large law firms which control DBA. Defendant judges are charged of conspiring with DBA and DCGC for the purpose of instigating a disbarment suit with the illegitimate objective of influencing the outcome on an election. The efforts of defendant Judge Walker to exercise pressure upon DCGC are set forth in detail (P.A.10-14). The allegations that he "misrepresented" the contents of a certain letter at a DCGC hearing and that petitioner Howell demonstrated at such hearing that the Walker grievance "was a mere spite action" must be taken as true for purpose of testing the complaint. The allegations that DCGC "could find no valid grounds to act" (P.A.13), but that it nevertheless filed a disbarment suit "obviously planned and timed for maximum political impact" (P.A. 18) must likewise be accepted. The "lacks specificity" claim will not stand up to analysis.

Second Claim

(a) The claim that no cause of action has been stated under 42 *U.S.C.* §1985 "against the Dallas Bar Association" (DBA Br. 2) is irrelevant to petitioners' question two under which petitioners urge that the District Court ruling upon judicial immunity is erroneous.

(b) The basic distinction between §1983 of the Civil Rights Act and §1985 is that the former requires action by

a state officer under color of state law while the latter does not. The seventh issue presented to the Fifth Circuit by petitioners urged that DBA could be held under §1985 even without proving action by a state officer (Ptn. 16-17). We concede that the proposition has not been brought to the Supreme Court, but it was not necessary to do so in order to challenge the ruling upon judicial immunity and thereby make out a case under §1983.

(c) On the other hand, if the District Court ruling upon judicial immunity is erroneous (as we think it is), then the acts of the defendant judges fulfills the requirement of action by a state officer under color of state law and a §1983 cause of action has been stated not only against those state officers, but also against all private parties acting in conspiracy with them. We find no argument or authority in the DBA brief to support any contention that petitioners have no §1983 cause of action against DBA even if the judicial immunity ruling be reversed; except the vagueness claim just discussed. The District Court did not find any such "independent basis" to exonerate DBA. There is none.

(d) Even if DBA was possessed of any such "independent basis" applicable only to itself, it is obvious that such would not convert question two into a hypothetical or "gratuitous" inquiry because there are other parties to this action.

First Claim

(a) Assume for a moment that this Court ultimately agrees with petitioners' position and rules that judicial immunity was improperly applied in this case. We think the District Court's ruling of "the Constitution does not protect the right to seek or hold office" is again irrelevant for reasons to be immediately discussed. But, if we be in

error, it follows that as long as *Rule* 23(1)(c) means what it says, then the "no protection" ruling must necessarily be a subsidiary question fairly comprised in our question two.

(b) We think the District Court was plainly in error in its "no protection" ruling. The matter is discussed on page 13 of the petition. *Snowden v. Hughes,* 321 U.S. 1 (1943), relied upon by the District Court is no longer viable authority. Aside from one or two questionable district court rulings, it has not been cited as controlling for a number of years.

(c) More importantly, the "no protection" ruling is irrelevant because petitioners have sued for damages on account of *affirmative misconduct.* The Civil Rights Acts protect not only the ends, but the means by which those ends are accomplished. §1983 protects against all forms of official lawlessness. *Monroe v. Pape,* 365 U.S. 167 (1967); *Screws v. U. S.,* 325 U.S. 91 (1945). If the means involve affirmative misconduct, those means are independently actionable regardless of the ends sought to be accomplished.

(d) The "no protection" ruling and the *Snowden* case have no bearing upon petitioners' cause of action *for damages.* We have never heard of any provision of the Constitution or the laws of the United States declaring that a minor child is possessed of the right not to be sterilized without a judicial finding of necessity for his health and welfare. *cf. Sparkman v. McFarlin,* 552 F.2d 172 (7-In. 1977). We are nevertheless confident that Judge Stump cannot claim any such "independent basis" as a bar to suit *for damages* on account of his lawless order that a child be sterilized.

Assume that petitioner Howell was local attorney for General Motors and the defendant judges and their co-defendants, out of spite, conspired to bring a baseless dis-

barment suit against petitioner Howell knowing that the adverse publicity would cause General Motors not to renew petitioner's retainer contract. Could defendant judges and their cohorts escape liability *for damages* upon the claim there is no constitutionally protected right to represent General Motors? Obviously not!

(e) In addition to damages, these petitioners have also asked for injunctive relief. We cannot conceive how the District Court's "no protection" ruling can be stretched beyond petitioner's plea for injunctive relief. In this connection, petitioners would urge that, after the Supreme Court has reversed the immunity ruling and if it does not incidentally pass upon the "no protection" ruling, the Court should instruct the Courts below to reconsider the "no protection" ruling so that petitioners may obtain complete relief.

CONCLUSION

The alleged "independent bases" are tissue. A writ should issue to consider the serious questions presented by the petition; questions which are controlling to the case.

Respectfully submitted,

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